

Comment

Turkey – Measures Affecting the Importation of Rice (DS334)

Prepared for the ALI Project on the Case Law of the WTO

NIALL MEAGHER

Senior Counsel, Advisory Centre on WTO Law (ACWL), Geneva

1. Introduction

It is a pleasure to provide this comment on David Gantz's and Simon Schropp's insightful paper on the WTO Panel Report in *Turkey–Measures Affecting the Importation of Rice*.¹ As Gantz and Schropp concentrate on the aspects of the Panel Report addressing issues of the role of *prima facie* proof and the litigation process, I will do likewise in this comment.

1.1 Prima facie case and the burden of proof

1.1.1 The issue before the panel

As the authors explain concisely, the issue of how a WTO panel should determine whether the complainant has made a *prima facie* case was raised at the interim review stage in *Turkey–Rice*. In the interim report, the Panel stated that in order to assess whether the United States had met its initial burden to make a *prima facie* case, the Panel would consider the evidence on record, *as submitted by both parties*. In its comments on the interim review, the United States argued that the Panel find that the complainant had made a *prima facie* case, thereby shifting the burden of proof to the defending party, only if the *complaining party* has provided sufficient evidence and argumentation.²

The views expressed in this comment, as well as any errors, are those of the author alone. I would like to thank Henrik Horn, Petros Mavroidis and the American Law Institute (ALI) for inviting me to participate in this project and to provide this comment.

1 Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007) (hereinafter 'Panel Report' or '*Turkey–Rice*').

2 Panel Report, paras. 5.9–5.11.

In response, the Panel referred to its obligation under Article 11 of the DSU to make an objective assessment of the facts of the case as implying that the Panel is ‘bound to consider all the evidence on the record’, including the evidence submitted by both parties and evidence obtained by the Panel itself under Article 13.1 of the DSU.³ In the Panel’s view, this obligation did not relieve the complaining party of the burden to make a *prima facie* case.⁴ Nevertheless, the Panel’s terminology in the final report remains less than clear: it says that ‘the initial burden of proof rests upon the United States, as a complainant, to establish its *prima facie* case’.⁵ However, the Panel then stated that in order to assess whether the United States has met this initial burden, the Panel must consider ‘if the evidence on the record, as submitted by both parties’ is sufficient to raise a preliminary presumption ... Only if the evidence on the record is sufficient for the panel to conclude that the United States has made a *prima facie* case, would the burden then be shifted onto Turkey to adequately rebut the United States’ allegations’.⁶ While the panel did not cite to it, the Panel’s finding was consistent with that of the Appellate Body in *India–Quantitative Restrictions*, in which the Appellate Body considered it ‘not objectionable that the Panel took into account, in assessing whether the United States had made a *prima facie* case, the responses of India to the United States’.⁷ This notion that a determination of whether a complainant has made a *prima facie* case should involve an analysis of evidence submitted by both parties raises an important question as to the nature and role of a *prima facie* finding in WTO dispute-settlement proceedings, to which I shall return.

Dissatisfied with the United States’ position that the evidence submitted by Turkey should *not* be relevant to the issue of whether a *prima facie* case has been made, the authors compare the United States’ view of how the litigation process should unfold (Scenario 1) with the Panel’s (Scenario 2) and the authors’ own view (Scenario 3) of how the burden of proof should shift as the Panel resolves the dispute. It is striking that the authors’ approach appears to accept without question that Panels will conduct some sort of sequential, or at least two-step, analysis of the evidence and argument submitted by the parties, including a *prima facie* analysis and a subsequent final analysis. This is the second issue that I shall address: whether such a sequential process actually exists in either the law or practice of WTO dispute-settlement proceedings.

3 Panel Report, para. 5.12. Article 13.1 of the DSU authorizes panels to seek information and technical advice from any individual or body which it deems appropriate.

4 Ibid.

5 Panel Report, para. 7.59.

6 Ibid.

7 Appellate Body Report, *India–Quantitative Restrictions*, para. 142.

1.1.2 *The nature of a prima facie determination*

The literal meaning of the term *prima facie* is ‘at first sight’.⁸ As a legal term, it is generally understood, at least in the common-law tradition, to refer to such evidence or argument as is sufficient to sustain a judgement in favour of the complaining party unless it is rebutted or contradicted.⁹ In municipal systems, this may imply the existence of a procedural step in litigation whereby the court will, if the complaining party fails to make a *prima facie* case, dismiss the case without requiring the defendant to produce exculpatory evidence and argument.¹⁰ In such systems, defending parties have every reason to try to seek dismissal of the action at a preliminary stage on the grounds that the complaining party has failed to make a *prima facie* case. It may also imply the existence of rules of discovery, whereby the complainant can compel the defendant to produce evidence. The existence of these rules provides a justification for imposing a high standard of *prima facie* proof on a complainant.

The WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the ‘DSU’) does not refer to a *prima facie* case or to the allocation of the burden of proof. Article 11 simply requires the Panel ‘to make an objective assessment of the matter before it, including an objective assessment of the facts of the case’.¹¹ While Panels have ‘the right to seek information and technical advice from any individual or body which [they] deem appropriate’, they are not required to do so. These provisions presume to some extent that Panels will have complete information before them. Thus, ‘it is often said that the idea of peaceful settlement of disputes before international tribunals is largely based on the premise of co-operation of the litigating parties’.¹² Absent perfect cooperation, however, it becomes necessary for Panels, in fulfilling their own responsibility to conduct an objective assessment, to assign to the parties responsibility for the production of facts and to impose consequences for any failure to do so.

To do so, Panels and the Appellate Body have had recourse to the terminology used in municipal systems to describe the burden of proof, including the concept of a *prima facie* case. Thus, in *EC–Hormones*, the Appellate Body said that a *prima facie* case is one which, ‘in the absence of effective refutation by the defending

⁸ See, e.g., *Black’s Law Dictionary*, 5th edn (West Publishing, 1979), p. 1071 (‘At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure’).

⁹ For a detailed discussion of the issues relating to *prima facie* proof in both municipal systems and in WTO dispute settlement, see Yasuhei Taniguchi, ‘Understanding the Concept of Prima Facie Proof in WTO Dispute Settlement’, in Merit E. Janow, Victoria Donaldson, and Alan Yanovich (eds.), *The WTO: Governance, Dispute Settlement and Developing Countries* (New York, Juris Publishing, 2008), p. 553. A more conceptual discussion of the topic can be found in the same volume: see David Unterhalter, ‘The Burden of Proof in Dispute Settlement’, *ibid.*, p. 543.

¹⁰ See, e.g., Taniguchi, ‘Understanding the Concept of Prima Facie Proof’, pp. 556–564.

¹¹ DSU Article 11.

¹² Panel Report, *Argentina–Textiles and Apparel*, para. 6.40, quoted in Panel Report, para. 7.7.

party, requires a Panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case'.¹³

This definition of a *prima facie* case as one to be evaluated in 'the absence of effective refutation by the defending party' implies that, as the United States argued in *Turkey–Rice*, the determination of whether the complaining party has made a *prima facie* case must be based *only* on the evidence or argument submitted by the complaining party. It is hard to see how Panels can properly determine the strength of the complainant's case 'in the absence of effective refutation by the defending party' if they may take evidence submitted by the responding party into account in doing so. To the contrary, the evaluation contemplated by the Appellate Body in *India–Quantitative Restrictions* and the Panel in *Turkey–Rice* seems more like an objective assessment of all the evidence, not a preliminary assessment at any kind of 'first sight'.

Finally, the practice of making *prima facie* determinations on the basis of evidence submitted by both sides would suggest that the amount of evidence the complainant needs to submit to establish a *prima facie* case can be increased to respond to the evidence submitted by the respondent. The Appellate Body has said that 'precisely how much and precisely what kind of evidence' will be required to make a *prima facie* case 'will necessarily vary from measure to measure, provision to provision, and case to case'.¹⁴ It is not clear that the Appellate Body envisaged that the quantity of evidence needed to establish a *prima facie* case would be affected by the evidence provided by the responding party. Nevertheless, it seems reasonable to assume that if Panels are permitted to take the evidence submitted by the responding party into account, the amount of evidence required of the complaining party to make its *prima facie* case may be correspondingly greater. Again, this suggests that the *prima facie* determination is something more than a determination 'at first sight'. In addition, it makes little practical sense to talk of the *prima facie* case as serving to shift the burden of providing evidence if that shift takes place *after* the responding party has already provided evidence.

1.1.3 How *prima facie* determinations are used in WTO dispute settlement proceedings

In WTO dispute settlement, Panels almost never rule on claims 'at first sight'. There is no formal system of preliminary rulings on whether the complainant has failed to meet its burden to make a *prima facie* case. Complaining Members do not benefit from any rules of 'discovery' they can use to compel the production of evidence from the other party. In the absence of rules of discovery, it makes less sense to impose a requirement on complainants that they meet a preliminary threshold of proof that could be fatal to their cases. Similarly, defending Members do not have the option of withholding their defence, making a motion that the

¹³ Appellate Body Report, *EC–Hormones*, para. 104. See also, Appellate Body Report, *Canada–Aircraft*, para. 192.

¹⁴ Appellate Body Report, *US–Wool Shirts and Blouses*, p. 14.

complainant has not made a *prima facie* case, and, if that motion is not successful, subsequently submitting their defences. There are no strict time limits on the submission of evidence. Frequently, parties to the dispute continue to provide evidence, including in response to questions from the Panel, until after the second meeting of the Panel with the parties.

Panels occasionally rule that the complaining Member has failed to make a *prima facie* case. In practice, however, it can be difficult to discern in what sense such a *prima facie* ruling differs from a final or substantive ruling. To take just one example, in *Mexico–Steel Pipes and Tubes*, the Panel ruled that Guatemala had failed to make a *prima facie* case regarding a claim that Mexico had not conducted a proper causation analysis in an anti-dumping investigation.¹⁵ The Panel found that Guatemala's allegations were based on a misunderstanding of the factual evidence. However, it did so in its final report and after apparently after consideration of all of the evidence and argument submitted by both sides, including both argument and evidence submitted by Mexico in response to a specific factual question posed by the Panel.¹⁶ In these circumstances, it is not clear how the Panel's finding can properly be characterized as a finding that Guatemala failed to make a *prima facie* case, rather than a fully fledged substantive finding based on an 'objective assessment of the facts of the case' within the meaning of Article 11 of the DSU. This ambiguity is perhaps consistent with the Appellate Body's rulings that Panels are not required to make express findings that the complaining party has discharged its burden of making a *prima facie* case before they consider the evidence submitted by the defending Member.¹⁷ But the fact remains that the consequences are entirely the same regardless of whether the finding is considered as a *prima facie* or final determination: Guatemala did not prevail on this particular claim.

There are also practical reasons why the concept of a *prima facie* determination fits uneasily into dispute-settlement practice and procedure. Panel working procedures generally provide that parties should make requests for preliminary rulings not later than in their first written submission. However, the working procedures typically also provide that parties must submit all factual evidence to the Panel no later than during the first substantive meeting, although parties may continue to provide rebuttal evidence in subsequent submissions or in responses to questions from the Panel. In theory, this means that a party should request a preliminary ruling that the complaining Member has failed to make a *prima facie* case before the complaining Member's deadline to provide the evidence necessary to make that case has expired.

The situation is, of course, somewhat different in cases where the defending Member chooses not to submit evidence. In such cases, the question arises more

¹⁵ Panel Report, *Mexico–Pipes and Tubes*, para. 7.362.

¹⁶ *Ibid.*, para. 7.357.

¹⁷ See, e.g., Appellate Body Report, *Thailand–H-Beams*, para. 134.

clearly whether, in the words of the Appellate Body in *EC–Hormones*, ‘in the absence of effective refutation by the defending party’ the case presented by the complainant ‘requires a panel, as a matter of law, to rule in favour of the complaining party’.¹⁸ In these situations, Panels have described their obligation as being to satisfy themselves that the complainant ‘has established a *prima facie* case of violation, and notably that it has presented “evidence and argument ... sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision”’.¹⁹ In these cases, Panels may truly be said to be ruling on the basis of a *prima facie* standard, although, again, this is done as a final ruling rather than a preliminary ruling.²⁰ It should also be noted that, as a practical matter, it is much simpler to find in favour of the complainant where the defendant does not oppose the claim than to rule against the complainant on a *prima facie* basis where the defendant actually contests the claim.

1.1.4 *How this impacts the authors’ analysis of the litigation process*

The above discussion suggests that the concept of a *prima facie* case is problematic in WTO dispute-settlement proceedings. The approach of the Panel in *Turkey–Rice* (and the Appellate Body in *India–Quantitative Restrictions*) appears to confuse the concept of a determination ‘at first sight’ that, in the Appellate Body’s view, serves to shift the burden of proof with a final substantive determination based on an objective analysis of all the evidence. As noted above, it is problematic to speak of the burden of proof shifting after the responding party has already provided evidence. The *Turkey–Rice* Panel may have been concerned that it could not reconcile making a *prima facie* determination based only on the evidence submitted by the complainant with its obligation under DSU Article 11 to make an objective assessment of all the evidence. I think the two could have been reconciled in the manner suggested by the United States, especially if the *prima facie* determination really is a preliminary, *at first sight*, evaluation, as it appears to be in most legal systems, separate from the final assessment of the claim.

Moreover, the reality of current dispute-settlement practice and procedure is that there is no two-tier or sequential procedure. As explained above, there are generally no rulings on preliminary motions. The parties submit evidence and argument, on their own initiative and in response to questions from the Panel. The party that asserts a fact has the burden of proving it. Panels have the authority to make appropriate inferences regarding the failure of a party to provide necessary information. At the end of the process, Panels normally make a single objective assessment of the case, although occasionally describing their rulings as *prima facie*

¹⁸ Appellate Body Report, *EC–Hormones*, para. 104. See also, Appellate Body Report, *Canada–Aircraft*, para. 192.

¹⁹ Panel Report, *US–Shrimp (Ecuador)*, para. 7.11.

²⁰ In *US–Shrimp (Ecuador)*, the parties agreed to accelerated procedures.

rulings. Thus, Panels deliberate on whether complaining parties have made their *prima facie* case at the same time as they make their final substantive determination on the complaining parties' claims. Accordingly, the current WTO litigation process is probably more straightforward than any of the scenarios described by the authors.

Accordingly, it may reasonably be asked whether the use by Panels of the terminology of a *prima facie* case is necessary or helpful to understanding the litigation process or how Panels fulfil their obligation under DSU Article 11 to make an objective assessment of all the facts. Where the parties submit their evidence over the course of the proceedings without deadlines, rules of discovery, and any real system of procedural motions, and Panels conduct a single 'objective assessment of the matter before it' and issue a single set of rulings in the form of the Panel Report, the concept of a *prima facie* determination may be superfluous. In WTO dispute settlement, therefore, it may be particularly apt to suggest that the *prima facie* determination shifts the burden of proof primarily in the mind of the trier of fact (i.e., the Panel).²¹

So how does this affect the litigation process proposed by the authors (Scenario 3)? For the reasons explained above, the two-step process envisaged by the authors would necessitate some changes to current Panel practice and procedure. However, it is not clear exactly what procedural steps or consequences the authors envisage as resulting from the *prima facie* stage. The authors state that under their scenario, 'objective panel assessment' would run 'in perfect parallel to the parties' submissions and testimonials', but do not specify what procedural or other consequences would flow from the Panel making findings earlier in the process. One possibility may be that prior to their final deliberations, Panels would notify parties of any failures or gaps in the evidence provided and permit the parties to remedy the deficiency. It could be argued, however, that Panels already do this: while the authors call for more interventionist Panels, it is not uncommon for Panels to pose more than 50 questions to the parties following each Panel meeting.

The authors also suggest that under their scenario, Panels would incur higher costs in terms of the time taken to complete reports and financially for the parties involved. I agree with the authors that there may not be a groundswell of support for this! The Panel process is already, on average, over 10 months,²² almost twice the six-month period contemplated by the DSU.²³ The issue of the cost of the process is very controversial, especially with respect to developing countries' access to the system. Proposals that increase the duration and cost of the process must, therefore, be approached with caution.

The authors state that the most significant advantage of their Scenario 3 is that it makes the strategic withholding of information less desirable for litigating parties.

21 See Taniguchi, 'Understanding the Concept of Prima Facie Proof', p. 557.

22 See <http://www.worldtradelaw.net/dsc/database/paneltiming.asp>.

23 See DSU Article 12.8.

If there is no real system of preliminary motions or rulings, it would appear already to be risky to withhold information on strategic grounds. In addition, this goal can be realized by Panels exercising more vigorously their authority to draw appropriate inferences in the event of a failure or inability of a party to provide relevant information.²⁴ This would be preferable to introducing additional procedural or legalistic complexities in the process.

²⁴ See Panel Report, *Turkey–Rice*, para. 7.10.